

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MITCHELL ERVIN CARTER,

Defendant-Appellant.

UNPUBLISHED
February 28, 2006

No. 257110
Newaygo Circuit Court
LC No. 03-008007-FH

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted from a judgment sentencing him to three to five years' imprisonment for first-degree retail fraud. MCL 750.356(c). Defendant pleaded guilty in exchange for the prosecutor's promise not to seek sentence enhancement under MCL 769.12. Defendant's sole issue on appeal is that the circuit court erred in exceeding the sentencing guidelines. We affirm. This case is being decided without oral argument under MCR 7.214(E).

Under the sentencing guidelines, the trial court must impose a minimum sentence within the appropriate guidelines range unless the court states on the record a "substantial and compelling reason" for departing from that range. MCL 769.34(2), (3). A "substantial and compelling reason" for departure must be "objective and verifiable" and should "keenly or irresistibly" grab the court's attention; it should be of considerable worth in deciding the length of the sentence. *People v Babcock*, 469 Mich 247, 257-258; 666 NW2d 231 (2003). Objective and verifiable factors are defined as actions or occurrences that are capable of being confirmed and are external to the minds of the judge, defendant, and others involved in making the decision. *People v Fields*, 448 Mich 58, 66; 528 NW2d 176 (1995). Further, a court may not base its departure on an "offense characteristic or offender characteristic already taken into account in determining the appropriate sentencing range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight." MCL 769.34(3)(b). Thus, a substantial and compelling reason for departure will exist only in exceptional cases. *Babcock*, *supra* at 257.

We review the trial court's determination that a particular factor exists for clear error, review de novo the trial court's determination that a factor is objective and verifiable, and review for an abuse of discretion the trial court's determination that a factor constitutes a substantial and compelling reason for departure from the appropriate guidelines recommended range. *Id.* at 264-

265. A court abuses its discretion when it imposes a sentence falling outside the range of reasonable and principled outcomes. *Id.* at 269.

Defendant argues that the trial court impermissibly relied on subjective factors in departing above the sentencing guidelines range. Defendant bases his argument on the court's statement that defendant's criminal record was the "worst record I've ever seen," arguing that "worst" by definition is a subjective comparison of defendant's criminal record to other offenders' records. But, defendant selectively characterizes the sentencing proceedings, ignoring the trial court's actual basis for the sentence. Before commenting that defendant's record was the "worst record I've ever seen," the court said that "given [defendant's] record, though, I am going to exceed Guidelines." Defendant has been convicted of ten felonies and twenty-seven misdemeanors and has yet to rehabilitate himself—a confirmable fact that is entirely external to the mind of defendant and the judge. Thus, the court relied on defendant's extensive criminal record to justify exceeding the sentencing guidelines, not its characterization of that record. See *People v Solmonson*, 261 Mich App 657, 669-670; 683 NW2d 761 (2004). Therefore, we conclude that the trial court properly determined that a "substantial and compelling reason" justified departure from the sentencing guidelines recommended range.

Defendant next argues that the trial court failed to explain how his prior record was given inadequate or disproportionate weight by the sentencing guidelines. Defendant argues that it was insufficient for the trial court to merely rely on defendant's prior record without explaining how or why the prior record was inadequately considered by the guidelines. MCL 769.34(3)(b); *People v Hornsby*, 251 Mich App 462, 474; 650 NW2d 700 (2003). While we agree that the court erred in failing to articulate why it believed that the guidelines did not adequately account for defendant's record, we conclude that remanding for resentencing would be futile. The sentencing guidelines do not give adequate weight to defendant's prior convictions. Prior record variable (PRV) 2's highest value assigns thirty points if an offender has four or more prior low severity felony convictions. MCL 777.52(1)(a). Defendant has ten such convictions. Similarly, PRV 5 assigns twenty points if a defendant has seven or more misdemeanor convictions. MCL 777.55(1)(a). Defendant has twenty-seven such convictions.

Accordingly, the record supports the trial court's implicit finding that the sentencing guidelines fail to give adequate weight to defendant's criminal history. There is no need to remand for an explicit statement to that effect because the record is clear that the trial court would not have sentenced defendant differently. *Babcock*, *supra* at 260 n 15.

We affirm.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey